SEP 14 1970
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NO. 533

IN THE

Supreme Court of the United States

October Term, 1970

SOUTHERN STEVEDORING & CONTRACTING COMPANY, *Petitioner*

v.

D/S OVE SKOU, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION AND CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(2) Is there any sound legal basis for requiring the Vessel Owner to bear half the attorneys' fees of the Time Charterer, for which fees the two stevedores are contractually liable, when the Time Charterer had no legal liability to the plaintiff anyway, according to well settled principles of law? 4

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NECESSARY PRELIMINARY STATEMENT

This case grows out of an injury sustained on February 29, 1960 by James B. Hebert (the injured longshoreman) who fell as a result of stepping on a short hatch board. At the time he was employed as a longshoreman in Port Arthur, Texas and was assigned the task of uncovering a hatch on the SS JYTTE SKOU. He was employed by Port Arthur Shipping Corporation (Port Arthur Stevedore). The hatch board had been put in place in Houston some 39 hours earlier by the Petitioner, Southern Stevedoring & Contracting Company (the Houston Stevedore).

D/S Ove Skou, Respondent and Cross Petitioner (the Vessel Owner) had time chartered the vessel to United Fruit Company (the Time Charterer). The Time Charterer had contracted for the stevedoring with each of the two stevedors, and had made written provisions for indemnity. The Vessel Owner was not a party to these written indemnity agreements and sued the two stevedores on the *Ryan* theory.[1]

The trial court found that the Houston Stevedore breached its warranty in installing a board which was too short,[2] that the Port Arthur Stevedore breached its warranty in failing to discover the short hatch board,[3] and, while this occurred before the recent flurry of cases dealing with contributory negligence of injured longshoremen and its effect on the employer's breach of warranty, the court also found that the injured longshoreman was negligent in failing to discover the short hatch board.[4] However, the trial court attempted to award only "50% indemnity", and the Court of Appeals reformed the judg-

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1. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

2. "Southern Stevedoring & Contracting Company, in placing the hatch board in question in the place where it was, and in not observing that it was short, failed to do its work in a safe and workmanlike manner, which contributed to cause the accident and injuries suffered by Libellant." Findings of Fact VIII, Appendix "A", page 33 of Houston Stevedore's petition and 232 F. Supp. 277 at page 280.

3. "Port Arthur Shipping Corporation, in removing the hatch board in question and in not observing that it was short, failed to do its work in a safe and workmanlike manner, which contributed to cause the accident and injuries suffered by Libellant." Findings of Fact IX, Appendix "A", page 33 of Houston Stevedore's petition and 232 F. Supp. 277 at page 280.

4. "Libellant negligently failed to keep a proper lookout for his safety, which contributed to cause his injuries by twenty (20%) per cent." Findings of Fact X, Appendix "A", page 33 of Houston Stevedore's petition and 232 F. Supp. 277 at page 280.

ment by decreeing that the Vessel Owner should recover full indemnity.

Nonetheless, the Vessel Owner was ordered to bear one-half of the attorneys' fees of the Time Charterer. While this involves a negligible amount of money in contrast with the rest of the case, that is clearly wrong. The Vessel Owner not only responds here to the petition of the Houston Stevedore (who apparently seeks to obtain a finding that its breach was not causally connected with the injury), he also seeks to have the Court of Appeals judgment reformed as to its requirement that the Vessel Owner pay one-half of the expenses of the Time Charterer, or at least that the Vessel Owner be given the right to recover that amount of money over against the two stevedores.

OPINIONS BELOW

The opinion of the District Court is reported at 232 F. Supp. 277 and, along with that Court's supplemental finding of fact, is contained in Houston Stevedores petition, Appendix A. The opinion of the Court of Appeals of the Fifth Circuit is reported at 365 F.2d 341 (1966) and is reprinted as Houston Stevedore's Appendix B. The Court of Appeals order denying a Petition for Rehearing is printed as Houston Stevedore's Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) The Houston Stevedore picked up and put in place a hatch board which was too short to extend the distance

between the beams, and the injured longshoreman stepped on it 39 hours later and fell through—was there a causal connection between the Houston Stevedore's breach of warranty and the injured longshoreman's fall?

(2) Is there any sound legal basis for requiring the Vessel Owner to bear half the attorneys' fees of the Time Charterer, for which fees the two stevedores are contractually liable, when the Time Charterer had no legal liability to the plaintiff anyway, according to well settled principles of law?

(3) Even if the vessel owner were legally responsible, on some theory, to the Time Charterer for half of its cost of defending the longshoreman's invalid action against it, isn't that expense part of the owner's indemnity recovery over against the Houston and Port Arthur Stevedores?

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (Houston Stevedore's Appendix A at pages 27-38) and the Court of Appeals (Houston Stevedore's Appendix B at pages 39-60) and summarized in the Necessary Preliminary Statement.

ARGUMENT

The Houston Stevedore's petition erroneously states that the Vessel Owner *knew* that the hatch board in question was too short to reach between the beams, and that it callously, if not deliberately and purposely, refused to do anything about it. There is no finding, evidence, nor even hint that the Vessel Owner was guilty of such a conscious disregard of the safety of others. If there had been a determination based upon "fact decisions made

by the Judge before whom the facts [were] annealed through the hammering, heating process of vigorous running advocacy," it might be a different matter, but that is not the present case.[5]

The Trial Court found "that the Respondent, D/S Ove Skou, was negligent in supplying the short hatch board for use at hatch #1, which negligence contributed to cause the accident and injury suffered by Libellant."[6] There is no finding anywhere that the Vessel Owner knew that the Houston Stevedore had picked up a hatch board which did not fit and put it in place, nor is there any finding anywhere in the record from which it may be legitimately argued that the court did so find. There is a tremendous difference between conscious knowledge and "should have known."

The answer to the contention that there was an intervening cause is contained in footnote 25 of Houston Stevedore's petition.[7] The facts are that if the Houston Stevedore had not placed the short hatch board between the beams, instead of one of those which fit properly, the accident never would have occurred. The fact that the Port Arthur Stevedore was equally at fault does not relieve the Houston Stevedore.

In effect, the Houston Stevedore is really arguing that the Port Arthur Stevedore was equally at fault, and by

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5. Quoted words from Opinion of Court below, 365 F.2d 341, at page 346, Houston Stevedore's petition, Appendix B, page 46.

6. Supplemental Findings of Fact IV, Appendix "A" of Houston Stevedore's petition, page 37.

7. Houston stevedore's petition at page 22, footnote 25, states in part: "Perhaps the answer is so obvious that everyone but the Houston Stevedore's inept counsel knows what it is and it is unnecessary to articulate it just for them."

the same token is making a similar argument against the vessel. This is an attempt to argue "conduct sufficient to preclude indemnity" in a situation, again, where it is necessary to alter the evidence and the findings in order to come up with such an argument. It makes no difference that the vessel owner was negligent. The Vessel Owner did not interfere with the operations of the Houston Stevedore. While the chief mate did check the closing of a hatch, he was concerned with watertight integrity, and the stevedore was charged with fitting the hatch boards.[8]

The Houston Stevedore's reliance upon *Reddick v. McAlister Lighterage Line, Inc.*, 258 F.2d 297 (2 Cir., 1958, cert. den. 358 U.S. 908) is misplaced. Except for the fact that that case involves a latent defect, it would give more comfort to the Port Arthur Stevedore than the Houston Stevedore. As it is, the Houston Stevedore is in the position of being the party really responsible for that accident, according to that decision, and even more so, since this did not involve a latent defect.

Independent of the vessel's non-delegable legal liability to the injured longshoreman, the stevedores have certain rules which regulate these operations in the Gulf Coast. The Deep Sea Longshore and Cotton Agreement for Texas Ports in effect at the time this case arose states in Rule No. 1:

> "When vessel is in loading or unloading berth * * * opening and closing of hatches * * * is longshore work and will not be done by ship's crew."

The Contract, in Rule No. 2 subsection 12, states in part:

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8. United States Court of Appeals for the Fifth Circuit, Printed Record Page 234. Also see pages 290 and 291.

> "Hatch tenders or Gang Foremen's responsibilities: * * * he shall be recognized as the key man around whom the gang is formed. * * * The safety of the gang as well as the cargo is up to him.
>
> He is required to give his personal attention to the removal of hatch covers and beams. Hatch covers must be piled neatly against bulwark. * * * When work is stopped, the necessary beams must be shifted in place, and hatch covers put on in proper order and squarely landed."

Furthermore, in the eyes of the industry the Federal Safety and Health Regulations for Longshoring, Title 29 C.F.R. § 1504.31, although not effective until a few months after the incident, codified good industry practice. In part, these regulations state:

> "(c) Missing, broken, split, or poorly fitting hatch covers that would jeopardize the safety of employees shall be reported at once to the officers in charge of the vessel. Pending replacement or repairs of the vessel, work shall not be performed in the section containing the unsafe covers or in adjacent sections unless the flooring is made safe.
>
> "(d) When the hatch covers and beams are not of uniform size they shall be placed only in the hatch, deck, and section in which they fit properly."

Consequently the Houston Stevedore was responsible for the removal of the boards, and after the work in the hold was completed, supervising the closing of the hatch without the assistance and guidance of the ship's crew. In view of this, and in view of the fact that the Houston Stevedore is so adamantly concerned about the ship's *knowledge* of the existence of the too-short hatchboard, it should be obvious to all — including the Houston Steve-

dore — that the attending longshoremen are the ones who should have recognized the defect in the hatchboards. Had they done so, one of the spare hatchboards lying where they could plainly be seen by the longshoremen would have been provided and the defect would have been cured.[9] This they failed to do and the Houston Stevedore consequently failed to do its work in a reasonably safe and workmanlike manner.

The Houston Stevedore is unnecessarily distressed that it has been unable to prevail in its argument that due to the 39 hour voyage to Port Arthur, there was an intervening cause. The Court of Appeals correctly observed:

> "All must recognize that whatever was the condition on the opening of the hatch at Port Arthur existed at the moment of closing in Houston."

In analyzing Houston Stevedore's reliance on the *Weyerhaeuser* doctrine it would be difficult to improve on the language used by the Court of Appeals;[10] at page 348 that Court stated:

> "Houston Stevedore can find no escape based on the assertion that as part of the WWLP, the stevedore had no obligation as a matter of law to discover latent defects. The Trial Court did not find that the too-short board was a latent defect. On the contrary, on pre-trial hearing it categorically held that the shipowner had negligently supplied a defective board —a conclusion which implies that with a reasonable amount of attention, the defect would have been

9. United States Court of Appeals for the Fifth Circuit, Printed Record Pages 140 and 214.

10. *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed.2d 491 (1958).

> discerned. . . . Nor does it succeed by the *Weyerhaeuser* contention that shipowners 'conduct * * * (was) * * * sufficient to preclude recovery' *Weyerhaeuser S.S. Company v. Nacirema Company* 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 2d 49 . . . AMC . . . In the final analysis, this attack comes down to nothing more than the assertion that shipowner furnished an unseaworthy vessel by supplying a too-short hatchboard, which stevedore had no reason to suspect was, or might be too short. This is but a repetition of the defence so long rejected that negligence of the ship owner or unseaworthiness of the vessel by reason of the defective appliance does not of itself foreclose amenity."

Perhaps the best way to conclude the argument that the Houston Stevedore's petition should be denied is to join in supporting its argument that the case may best be resolved by examining *Italia Societa v. Oregon Stevedoring Company; Inc.,* 376 U.S. 314, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964). The rule as announced by this Court in that case was that:

> ". . . . liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury."[11]

By virtue of the union contract and the methods of safety enforced in the Gulf Coast area, the Houston Stevedore was charged with the responsibility of replacing the hatchboards. If there was any defect it was their responsibility to call it to the ship's attention and the ship was entitled to rely on the Houston Stevedore's warranty of workmanlike performance in this regard. The Houston

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11. 376 U.S. 315 at page 319, 11 L.Ed.2d 732 at page 740, 84 S.Ct. 748, at page 754.

Stevedore was the last party actively involved in replacing and inspecting the hatchcovers and they were therefore in the best position to prevent the injury. By improperly sealing the hold they likewise sealed the fate of the plaintiff-longshoreman and the mere passage of time would not transfer this responsibility to anyone else.

For the foregoing reasons it is respectfully submitted that the Houston Stevedore's Petition for Writ of Certiorari should be denied.

REASONS FOR GRANTING THE CROSS-PETITIONER'S WRIT OF CERTIORARI

The Plaintiff sued both the ship owner and the Time Charterer, United Fruit Company, for his injuries based on the unseaworthiness of the SS JYTTE SKOU. While United Fruit Company was compelled to defend itself though not legally liable to the longshoreman, it had contractually provided for indemnity from the stevedores. In any event, these fees were not recoverable against D/S OVE SKOU according to any existing legal theory. It is incomprehensible that the Time Charterer can look to the Vessel Owner as opposed to the stevedores for satisfaction of these expenses. However, if the Vessel Owner is required to make this contribution to the Time Charterer it should be entitled to recoup them from the stevedores. The stevedores' breach of "warranty of workmanlike performance" caused the plaintiff's injury. As a consequence the Vessel Owner is entitled to be indemnified by the stevedores, for this, as well as its other damages occasioned by these breaches.

CONCLUSION

For the reason heretofore stated the Vessel Owner respectfully prays that Houston Stevedore's Petition for

Writ of Certiorari be denied and that this cross-petition be likewise granted, and that the all, not just half, of the Time Charterer's legal expense be borne by the Stevedores.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Petition for a Writ of Certiorari has been served upon Messrs. Mandell & Wright, First National Life Building, Houston, Texas, 77002, Attorneys for Plaintiff; Messrs. Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, Attorneys Southern Stevedoring & Contracting Company; Messrs. Eastham, Watson, Dale & Forney, Esperson Building, Houston, Texas 77002, Attorneys for United Fruit Company; Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, and Messrs. Strong, Pipkin, Strong & Nelson, McFaddin Building, Beaumont, Texas, Attorneys for Port Arthur Stevedores Division of Port Arthur Shipping Corporation, by mailing copies to them at the address shown, first class postage prepaid, on the _____ day of September, 1970.

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B. D. MCKINNEY